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CV-04-0001-RRR-NE

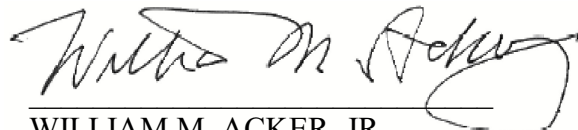
In their objections, the defendants insist that the magistrate judge was incorrect in considering the second amended complaint when determining whether the case was removable. A review of the record shows that defendants pointed out that the individual defendant's alleged fraud was not pled with the particularity required. The magistrate judge deemed that a valid objection, and required plaintiff to cure the deficiency by filing a more definite statement of the individual's alleged fraud.

In response, plaintiff filed a second amended complaint. Although the undersigned concludes that the magistrate judge properly considered the second amended complaint when determining whether removal was appropriate, the court believes that a mere Rule 9(b) deficiency in a complaint against a non-diverse defendant does not add up to fraudulent joinder. The presumption against removal gives the plaintiff the benefit not only of his complaint as initially stated against a non-diverse defendant, but what he might say in an amended complaint to meet the pleading standard of Rule 9(b). See this court's opinion of September 22, 2005, in *Dunn v. Trugreen*, CV-05-AR-1857-S.

This court is convinced that an "arguable" claim of fraud has been stated against the non-diverse defendant. As the magistrate judge pointed out in his opinion, "federal courts are not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law." *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1380-1381 (11th Cir. 1998).

A separate order of remand will be entered.

DONE this 27th day of September, 2005.

A handwritten signature in black ink, appearing to read "William M. Ackers, Jr.", written over a horizontal line.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE